

ADMINISTRATIVE APPEAL DECISION

TONY EVANGELISTA, FILE NO. 00-010-030-0

DETROIT DISTRICT

AUGUST 25, 2000

Review Officer: Suzanne L. Chubb, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Paul F. Bohn, Fausone, Taylor & Bohn, LLP, Northville, Michigan.

Receipt of Request For Appeal (RFA): May 25, 2000.

Basis for Appeal as Presented by the Appellant:

Reason I: The wetlands in question are not "adjacent" as that term has been used and interpreted by the U.S. Army Corps of Engineers (COE).

Reason II: The COE failed to timely assert jurisdiction over the property in question, after being given notice and opportunity to do so.

Site Visit: July 19, 2000.

Background Information: The COE and State of Michigan use a joint application form for projects involving work in wetlands and/or waterways. The application form directs applicants to submit applications to the Michigan Department of Environmental Quality (MDEQ), Land and Water Management Division (LWMD), in Lansing, Michigan along with a State filing fee, if applicable. The LWMD determines whether the application requires Federal review and, if so, will forward a copy of the application to the Detroit District prior to assigning the project to a Permits Consolidation Unit at the appropriate district office.

In this case, the Detroit District did not receive a copy of the application, submitted in April 1999, nor did they receive a copy of the State public notice published on 5 January 2000. The COE became aware of the proposal after receiving phone calls from local residents. The COE requested a copy of the State public notice on 1 March 2000 and received it on 17 March.

To determine Federal jurisdiction, the District performed an in-house review of resources (maps, aerial photographs etc.) and completed a site inspection on 5 April 2000. A COE letter, dated 19 April 2000 to the appellants, informed them that the onsite wetlands are adjacent to the Salt River and Lake St. Clair, both navigable waters of the U.S., and requested additional information to continue processing.

The Detroit District submitted the following information in support of the jurisdictional determination:

- Site inspection report dated 7 April 2000
- U.S. Geological Survey (USGS) map, New Haven quadrangle
- National Wetland Inventory (NWI) map
- Macomb County Soil Survey Map, Sheet No. 24, with soil legend and soil series descriptions
- 100-year floodplain map
- Aerial photograph, undated
- Completed 1987 delineation data form for sample point #1
- Project site map from engineering drawings
- Project plan view drawing
- CELRE-CO-L memo dated 12 July 1999
- Page of preamble to 33 CFR 330, Final Rule, published 22 November 1991 (FR Vol. 56, No. 226, page 59113)
- 33 CFR 328 regulations published 13 November 1986 at FR Vol. 51, No. 219, pages 41250-1

In addition to the above material, I requested the following additional information from the District:

- Interagency Memorandum of Agreement (MOA) between the State of Michigan and the Department of the Army
- Interagency MOA between the State of Michigan and the U.S. Environmental Protection Agency
- Macomb County Hydric Soils List

In a 14 June 2000 letter to the appellant, signed by Brigadier General Robert H. Griffin, I was delegated the authority to serve as both the Review Officer and decision authority regarding this RFA. This delegated authority is allowed by regulations at 33 CFR 331.3(a)(1).

Appeal Decision and Instructions to Detroit District Commander (DE):

Reason I: The wetlands in question are not “adjacent” as that term has been used and interpreted by the U.S. Army Corps of Engineers (COE).

Finding: Appeal has merit.

Action: As detailed in the discussion, the jurisdictional determination (JD) decision is remanded for reconsideration and, as appropriate, to provide additional documentation in the District administrative record to support the decision.

Discussion: The administrative record does not support the District’s JD decision. The term “adjacent” means bordering, contiguous or neighboring [33 CFR 328.3(d)]. Two factors are considered when determining adjacency, actual proximity of the wetland to the waterway and hydrologic connections between the wetland and waterway.

In this instance, the District's decision was based upon the rationale that project site wetlands continue offsite to within 100 feet of the Salt River and are connected to the river by a drainage ditch. The ditch is culverted under Hooker Road but the road does not rule out the possibility of adjacency [33 CFR 328.3(c)]. The District's rationale contains the factors discussed above but must be considered an assumption for two reasons. First, the District did not take a data point or points to confirm the existence of offsite wetlands. The sole data point was taken on the project site. Second, since the extent and location of offsite wetlands is unknown, their location relative to the river is also unknown.

The current documentation is unclear on some issues and raises several questions. The District determined that the drainage ditch is a water of the U.S. and a tributary of the Salt River. This determination was not clearly stated in the District's administrative record and there is no discussion to support this determination. During the site visit, Mr. Bob Deroche, the project manager, stated he believed the channel was historically constructed within jurisdictional wetland. The District needs to clearly explain their reasons for calling this ditch a water of the U.S. The discussion needs to include the source of hydrology to the ditch. The source should be from surface or groundwater sources and not strictly a result of runoff from climatic factors.

The presence and extent of wetland in the vicinity of the ditch must also be determined and documented. Data sheets should be completed in accordance with the 1987 Corps of Engineers Wetlands Delineation Manual. Following that, a determination must be made as to what waterway(s), if any, the wetland may be adjacent to. Wetland may be contiguous to the drainage ditch but this, by default, would not make them also contiguous to the Salt River. However, wetland may still be considered "adjacent" to the Salt River if it is determined to be bordering or neighboring the waterway. As a general comment, I find it reasonable to determine that wetlands within approximately 100 feet of a waterway are bordering or neighboring and therefore adjacent (assuming a hydrologic connection is also present).

The existing ground elevations for the project site is the subject of conflicting data. The appellants stated that the project plans contain the existing site contours ranging from 580-585 feet, consistent with spot elevations and contour lines shown on the applicable USGS topographic map. The District, through use of a computer software program, found that the project site closely approximates 577 feet, only slightly above the ordinary high water mark of Lake St. Clair and the Salt River (576.3 feet International Great Lakes Datum, 1985). This conflict needs to be resolved. The District should document the level of reliability of the software data in support of its use and application.

Finally, the District should reconsider the 12 July 1999 District memo included in the administrative record as supporting documentation. The preamble excerpt attached to the guidance pertains to headwater determinations for the purposes of Nationwide permits. It was not intended to be interpreted in the context of making jurisdictional determinations.

Reason II: The COE failed to timely assert jurisdiction over the property in question, after being given notice and opportunity to do so.

Finding: Appeal does not have merit.

Action: No action required.

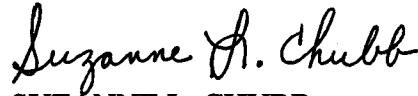
Discussion: I received no additional clarifying information regarding this reason – either in writing or at the site visit. I found nothing in the administrative record or in the District's actions to support this reason. The application was processed by the State of Michigan MDEQ in accordance with the 1983 interagency MOA and with current standard operating procedures established between the COE and State.

Summary of Findings:

Reason 1: Appeal has merit.

Reason 2: Appeal does not have merit.

FOR THE COMMANDER:

A handwritten signature in black ink, reading "Suzanne L. Chubb". The signature is written in a cursive style with a large initial 'S'.

SUZANNE L. CHUBB

Appeal Review Officer

Great Lakes & Ohio River Division